

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

OCT 20 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0186-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
GILBERT TADEO GARZA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20043213

Honorable Stephen C. Villarreal, Judge

REVIEW GRANTED; RELIEF DENIED

Gilbert Tadeo Garza

San Luis
In Propria Persona

ECKERSTROM, Presiding Judge.

¶1 Petitioner Gilbert Garza seeks review of the trial court's order summarily dismissing his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Garza pled guilty in 2005 to aggravated driving under the influence of an intoxicant while his driver's license was suspended. He also admitted having two historical prior felony convictions. The trial court sentenced him to a presumptive, ten-year prison term. Garza then filed a notice of post-conviction relief, and appointed counsel filed a petition arguing the court had erred by failing to impose a mitigated sentence. As part of that argument, Garza's counsel pointed out that, after Garza had been arrested and released in August 2003 for the DUI and related charges, he also had been charged with a probation violation in another matter based on that conduct. In September 2003, Garza was arrested in Maricopa County for a new offense, and a hold was placed on him pursuant to the warrant issued in the probation revocation matter. He was sentenced in April 2004 to a 6.5-year prison term for the offense in Maricopa County, but he was not indicted in the instant case until August 2004, when his probation finally was revoked. Although counsel acknowledged Garza was not entitled to pre-sentence incarceration credit for the time between his second arrest in 2003 and his indictment in 2004, *see* A.R.S. § 13-712(B),¹ she asserted the court should have considered the pre-indictment delay to be a mitigating circumstance. The court summarily denied relief, and Garza did not seek review of that decision.

¶3 Over five years later, Garza filed a second notice and petition for post-conviction relief asserting claims of ineffective assistance of trial and Rule 32 counsel.² As we understand his petition below, he contended that his counsel did not request a bail hearing after his September 2003 arrest and should have done so because the “probation

¹Section 13-712 was renumbered from § 13-709 in 2008. 2008 Ariz. Sess. Laws, ch. 301, § 27.

²Garza stated in his notice that he did not want counsel appointed.

warrant” listed the same charges ultimately filed in this case.³ He argued he was prejudiced because the bail hearing would have established he was in custody for the offense to which he ultimately pled guilty, and he therefore would have been entitled to credit for the time he was incarcerated before he was indicted. Garza also argued his Rule 32 counsel had been ineffective for failing to raise that claim. The trial court summarily dismissed his petition, concluding it already had addressed “the substantive issue of pre-indictment delay” as it related to pre-sentence incarceration in Garza’s first Rule 32 proceeding.

¶4 On review, Garza asserts that, because the trial court ruled on his petition without receiving a response from the state and Garza’s reply, his claims therefore were “not disputed” and relief should have been granted. He also asserts the court did not “acknowledge” and “rule[] on” his claims concerning the bail hearing and ineffective assistance of trial counsel in its ruling summarily dismissing his petition. But a trial court may rule on a petition for post-conviction relief without receiving a response from the state. *State v. Cawley*, 133 Ariz. 27, 29, 648 P.2d 142, 144 (App. 1982). And we find no defect in the court’s determination that Garza’s claim related to pre-indictment incarceration was addressed adequately and properly denied in his previous Rule 32 proceeding, nor in its implicit finding that counsel had not been ineffective in failing to request a bail hearing before Garza was charged with an offense. *See generally* A.R.S. § 13-3967(A) (specifying pretrial release procedures); Ariz. R. Crim. P. 7.2(a) (same).

¶5 Moreover, even if there were some merit to Garza’s claims below and his arguments on review, his second notice of post-conviction relief patently was untimely,

³Garza apparently refers to counsel representing him in the probation revocation matter, as his counsel in this case had not yet been appointed.

having been filed over five years after the trial court summarily had denied his first petition. *See* Ariz. R. Crim. P. 32.4(a) (successive petition in of-right proceeding must be filed within thirty days of final order in first post-conviction proceeding). Garza’s notice and petition stated he was making a claim based on newly discovered evidence pursuant to Rule 32.1(e), which is excepted from the timeliness requirements of Rule 32.4(a). But he identifies no such evidence in his petition and provides no explanation for his untimely notice. Accordingly, the trial court did not abuse its discretion in summarily dismissing his petition. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm trial court’s ruling if legally correct for any reason); *see also* Ariz. R. Crim. P. 32.2(b) (providing for summary dismissal if defendant fails to provide “meritorious reasons” for untimely notice).

¶6 For the reasons stated, although we grant review, we deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge